72-1644

No.

Supreme Court, U. S.
FILED
JUN 7 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

IMPACT DIE CASTING CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THOMAS D. BURLAGE
SAMUEL W. WITWER, JR.
Attorneys for Petitioner

Of Counsel:

WITWER, MORAN & BURLAGE
141 West Jackson Boulevard
Chicago, Illinois 60604

TWENTIETH CENTURY PRESS, CHICAGO 60606

INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS AND RULES INVOLVED	3
STATEMENT OF THE CASE	5
A. The Union Campaign	5
B. Misconduct of Mildred Boyce	7
C. The Findings and Orders Here at Issue	10
D. Scope of This Petition	12
REASONS FOR GRANTING THE WRIT	12
This Court's Powers of Supervision Should Be Exercised Since the Seventh Circuit has Sanctioned An Application of Section 8(a)(3) Which is Directly in Conflict with Decisions of this Court and Other Circuits and with the Intent of Congress As Expressed in Section 10(c) of the Act	12
CONCLUSION	19

LIST OF AUTHORITIES CITED

PAGE

CASES:

American Compressed Steel Corp., 152 NLRB No. 39 (1965) 13

NLRB v. John Brown, et al., 380 US 278 (1965) 14

NLRB v. Fibers International Corporation, 439 F.2d 1311 (1st Cir. 1971) 15-16

NLRB v. Gladding Keystone Corp., 435 F.2d 129 (2nd Cir. 1970) 17

NLRB v. Princeton Inn Co., 424 F.2d 264 (3rd Cir. 1970) 16-17

NLRB v. Symons Manufacturing Co., 328 F.2d 835 (7th Cir. 1964) 17

NLRB v. West Coast Casket Company, Inc., 469 F.2d 871 (1972) 16

NLRB v. Whitfield Pickle Company, 374 F.2d 576 (5th Cir. 1967) 14-15

Pacific Plywood Company, 134 NLRB No. 77 (1961) .. 13

P. G. Berland Paint City, 199 NLRB No. 145, 81 LRRM 1353 (1972) 13, 17-18

S. A. Healy Company v. NLRB, 435 F.2d 314 (10th Cir. 1970) 16

STATUTES:

National Labor Relations Act, 61 Stat 136, 29 USC § 151 et seq.
Section 10(c) 13

MISCELLANEOUS:

House Reports, 80-1, Vol 2-11119 at p. 42 (1947) 14

Senate Debates, Congressional Record, Senate, June 6, 1947 at ¶ 6677, p. 1594 14

Thirty Sixth Annual Report of NLRB, BNA Labor Relations Yearbook, 1972, at p. 201 18

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

IMPACT DIE CASTING CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the Decision and Order of the United States Court of Appeals for the Seventh Circuit in its Cause Numbered 72-1842, entered on April 17, 1973.

OPINIONS BELOW

The Decision and Order of the Seventh Circuit Court of Appeals in this cause is set forth in the Appendix to this petition, commencing at page A-48, *infra;* it has not been officially reported.

The decision and order of the National Labor Relations Board is set forth in the Appendix to this petition, commencing at page A-45, *infra.*

The decision, findings, conclusions and order of the Administrative Law Judge of the National Labor Relations Board is set forth in the Appendix to this petition commencing at page A-1, *infra*.

JURISDICTION

The Decision and Order of the Seventh Circuit Court of Appeals sought to be reviewed was dated and entered on April 17, 1973. Petitioner filed a timely motion for a Stay of Mandate pending application for a Writ of Certiorari which was granted by the Seventh Circuit Court of Appeals in an order dated May 8, 1973.

The United States Code, Title 28 § 1254(1) confers jurisdiction on this Court to review by Writ of Certiorari the Decision and Order here in question.

QUESTIONS PRESENTED

(1) Whether an employer's discharge of a union adherent which is primarily and effectively motivated by legitimate business considerations can nevertheless be properly found to violate United States Code, Title 29 § 158(a)(1,3) on a theory that the employer was motivated *"at least in part"* by anti-union animus?

(2) Whether the Seventh Circuit Court of Appeals in upholding the National Labor Relations Board's use of a "partial motivation" standard in this case thereby issued an order in conflict with the decisions of other Courts of Appeals and sanctioned an application and interpretation of United States Code, Title 29 § 158(a)(1, 3) which is not supported by the language of the statute or the intent of the Congress?

STATUTORY PROVISIONS AND RULES INVOLVED

(1) The National Labor Relations Act, 29 United States Code, Section 158(a)(1, 3); hereinafter referred to as § 8(a)(1, 3):

"(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

(2) The National Labor Relations Act, 29 United States Code, Section 160 (c, f); hereinafter referred to as § 10 (c, f):

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him; And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section

158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

* * *

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted

by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

(3) Supreme Court Rules, Rule 19 (1)(b):

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

STATEMENT OF THE CASE

A. The Union Campaign

The Petitioner (Impact Die Casting Corporation) is a small manufacturer of aluminum and zinc castings located in Sandwich, Illinois. In late August, 1971, the International Molders' and Allied Workers of North America, AFL-CIO, began efforts to organize workers at the Company's plant.

Machine operator Mildred Boyce, the alleged discriminatee in this case, was active in starting and conducting the union campaign and the Company's management was aware of her activity. Through open discussion and conspicuous union activities around the plant, management soon learned the identities of approxmiately 20 other employees who also were ardent union adherents. Of the entire group of activists, only Boyce, who was terminated for reasons hereinafter discussed, and one other employee, who was suspended temporarily for damaging company property, received any disciplinary action during the organizational period. (R*. 172-174)

During the union drive, both the Company and the Union conducted vigorous campaigns to carry their views to employees. There was much discussion of the merits of the Union in informal conversations with supervisors, frequently initiated by employees, and an exchange of opinions in the form of numerous handbills and leaflets from the Union and letters and speeches from management. The Company's letters included assurances that no employee would be fired for union activities or associations and that secrecy and free choice would be observed in the representation election to be held on December 3, 1971 (R-182, 187).

The Company enlisted the assistance of legal counsel in connection with the union drive and had its counsel visit the plant to instruct supervisors concerning their duties and obligations under the Act.

The election, held under Board supervision, resulted in a "no union" vote by a margin of 39 to 34. The Union filed objections with the Board but withdrew them shortly thereafter.

---

* "R" references are to the printed Appendix filed in the Court of Appeals, certified as the record herein.

B. Misconduct of Mildred Boyce

During the times relevant to this proceeding, the Petitioner had in effect written rules and regulations providing, in part, for discharge or other disciplinary action for making false or malicious statements about other employees (Rule 9), wandering outside of department of employ (Rule 10), inattention to duties and wasting time on the job, especially in washrooms (Rule 4) and falsifying information on employment records (Rule 8).

Boyce was discharged on November 8, 1971 after the Company discovered that she had filed a false and duplicative insurance claim seeking benefits for her minor son under the Company's group insurance program. Boyce's entire record was reviewed by Company President Becker and other supervisors, and it was decided that the false insurance claim, together with other recent flagrant violations of the Company's rules and her indifference to numerous warning notices issued in connection therewith, compelled dismissal (R-61, 70-71). The record of misconduct by Boyce which confronted the Company at this time may be briefly summarized as follows:

1. Harassment and Abuse of other employees.

Beginning in early September, 1971, the Company received a succession of bitter written and oral complaints from several employees (two of whom, Fogo and Ralls, were active union adherents) expressing outrage over vile accusations and malicious gossip by Boyce[1]. Fogo quit her job expressing disgust over rumors circulated by Boyce that she was a lesbian (R-149, 151). The Company issued written warning notices to Boyce concerning the foregoing conduct.

---

[1] Attention is invited to the specific nature of Boyce's Abuse of one of these employees at R-136.

2. Inattention to Duties.

During October, 1971, Boyce began spending considerable periods of time away from her work area and was frequently observed loitering in the washrooms (R-73, 136). Complaints were received from women using the washroom that she was causing difficulty by making "nasty statements" to some of them. One employee, who observed Boyce in the washroom almost every time she visited the room, was subjected to obnoxious behavior and vile language by Boyce on those occasions (R-136). On October 12, the Company warned Boyce in writing concerning the foregoing conduct.

3. Solicitation of employees during working time.

On October 26, 1971, the company issued a warning notice to Boyce concerning her interference with production by soliciting employees on behalf of the union during her working time or when such employees were at work in their work areas. The notice was precipitated by an incident where Boyce attempted to summon Employee Herrera away from his work station before the end of his shift on October 22, 1973 (R-177).

Other instances of Boyce's working-time solicitation included her solicitation of a laborer, Raymond Stoudt, at his work station on September 22 and 23, 1971, and her attempt to distribute literature to employee Lockwood while she was at work at her work station on the 6th or 7th of September, 1971. The solicitation of employee Stoudt resulted in his filing a written complaint with the Company stating that he did not want to be bothered by Boyce (R-191).

4. Fraudulent Insurance claim.

On July 21, 1971, Boyce filed with the Company an insurance claim form seeking recovery of hospital and medical costs incurred in having her son treated for injuries. In

filling out the claim form, she indicated there was no group or other insurance which might be applicable to such medical expenses (R-115).

At the hearing, Boyce testified that in filling out the claim form she knew she was representing that no other insurance was held by herself or other members of her family, but insisted she was unaware at that time that her husband had any insurance. That representation was untrue. Boyce's husband, Robert, was enrolled in the group insurance program of his own employer in a nearby city providing similar medical benefits for dependents. Boyce was living with her husband during this period, conversed with him and saw him at regular intervals (R-118). Furthermore, as of that time, five recent medical claims covering the Boyce family had been processed under the husband's insurance (R-134).

Robert Boyce filed an almost identical claim covering the same injury with his employer on July 29, about 8 days after the wife's claim was received by Petitioner. He was paid $396.20 on his claim a few days thereafter. Boyce admitted knowing of this payment about the time her husband received it (R-119). However, she made no effort in the ensuing weeks to withdraw or reduce her claim with Petitioner's insurance carrier and continued inquiring when she would get her money (Id).

Approximately two months after "learning" of her husband's recovery of the benefits from his employer, Boyce absented herself from work to contact an attorney because the husband had allegedly absconded with the insurance money he had received. Upon learning of this, Company President Becker became alerted to the possibility that duplicate claims had been filed. Meanwhile, the Company's insurance carrier forwarded checks on Boyce's claim in the aggregate amount of $398.20.

Becker contacted Petitioner's carrier, which issued a duplicate coverage inquiry to the husband's insurer. It was then confirmed that the claim had been duplicated. The Company was formally advised of the outcome of the inquiry by letter dated November 2, 1971 (R-180-181). The checks sent to the Company for payment to Boyce were returned to the insurer and the termination meeting then took place.

C. The Findings and Orders Here At Issue.

1. The Law Judge's Decision.

The Law Judge found that while Boyce "untruthfully" filled out the insurance claim (A-31), "In any event . . . Boyce 'was discharged at least in part because of union activity'" (A-28). Although conceding that ". . . [the Company's] grounds (or any of them) could well have immunized the discharge . . ." (A-29) the Law Judge expressed "difficulty in believing Boyce's union role was not a significant and controlling determinant in Respondent's decision to discharge her" (A-30).

Despite the fact that Boyce did not deny the harrassment and malicious gossip charges at the hearing, and notwithstanding evidence that the Company had previously dealt severely with this form of misconduct (the Company had discharged three women for harrassment and malicious gossip similar to Boyce's before the onset of the union campaign) the Law Judge characterized this ground for discharge as pretextual. He rested his ultimate conclusion essentially on the "multiplicity", "inadequacy" and "falsity" of the Company's assigned reasons (A-30) and upon certain alleged Company communications with employees which he found to be coercive (A-13-15).

With regard to communications with employees, the Law Judge found that "most of the statements of Respondent

to its employees, in letters, as well as speeches, were within permissible bounds of protected free speech" (A-11-12). However, he further found that the Company exhibited "hostility toward unionization" and coercive conduct in certain of its expressions and remarks to employees (Id.).

2. The Board's decision.

The Board adopted the Law Judge's findings and conclusions. In so doing, it denied the Company's motion to reopen the record for receipt of newly discovered evidence fortifying the Company's position that Boyce knowingly and deliberately engaged in a pattern of duplicating insurance claims.[2] The Board's rationale was that for "reasons fully explicated in the [the Law Judge's] decision. . ." this asserted reason for discharge was nevertheless pretextual. The Board said (A-46):

> "Additional evidence of the kind sought to be introduced would add nothing except further support for his [the Law Judge's] finding of the untruthfulness of Boyce's representation."

The Board's Order directed the Company to reinstate Boyce with full backpay, to cease and desist from violating Section 8(a)(1) and (3) of the Act and to post the usual compliance notice.

3. The Seventh Circuit's Decision

In its decision dated April 17, 1973, the Seventh Circuit Court of Appeals adopted without opinion the findings and conclusions of the Law Judge and Board. However, the

---

[2] See Petitioner's Motion and suggestions for reopening the Record at A-40-45.

Court did express approval of the reasoning underlying the Board's decision in its order. (A-49).

D. Scope of this Petition.

For the sake of brevity, Petitioner intends to limit its arguments herein to the question of the alleged discriminatory discharge, which it believes to be of paramount importance. However, in the event a Writ is granted, Petitioner will also seek reversal of the Section 8(a)(1) findings on the ground that such findings are erroneous and unsupported by substantial evidence.

REASONS FOR GRANTING THE WRIT

THIS COURT'S POWERS OF SUPERVISION SHOULD BE EXERCISED SINCE THE SEVENTH CIRCUIT HAS SANCTIONED AN APPLICATION OF SECTION 8(a)(3) WHICH IS DIRECTLY IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS AND WITH THE INTENT OF CONGRESS AS EXPRESSED IN SECTION 10(c) OF THE ACT.

The central issue presented here is whether a Board order of reinstatement with backpay can properly rest, as it did in the instant case, on a finding that the employer acted "at least in part" out of antiunion hostility. A proper assessment of the record in this case will demonstrate that Boyce was guilty of intolerable conduct and that Petitioner's purpose in discharging her was wholly related to its legitimate desire to remove a dishonest and unfit employee from its work force.

However, even assuming that substantial evidence supports the Board's inference that Petitioner acted out of mixed motives, *one* of which was resentment of Boyce's union activities, we submit that such an inference is not

a proper foundation for finding unlawful discrimination. The Board failed to do what the law requires in this case —find on the basis of substantial evidence that Boyce's union involvement was the dominant, effective or principal reason for her discharge.

Review of the Board's enforcement actions under Section 8(a)(3) demonstrates that the Board, at least until quite recently,[3] has persisted in relying upon a "purity of motivation" standard, reasoning that all disciplinary actions not *solely* prompted by legitimate business considerations are proper targets for remedial action. See, for example, *Pacific Plywood Company*, 134 NLRB No. 77 (1961) and *American Compressed Steel Corp.*, 152 NLRB No. 39 (1965).

We contend that all too often, and indeed in the present case, this rationale has enabled the Board to disregard undisputed evidence of gross misconduct and to order reinstatement simply on the finding that *some* element of antiunion animus was present. Such an insistence upon motivational purity, which seemingly would brand any discharge of a unionist which satisfies an employer as per se illegal, is not only unrealistic, but collides with the clear intent of Congress expressed in Section 10(c) [29 U.S.C. 160(c)] of the Act. That section provides, in part, as follows:

> ". . . no order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause . . ."

---

[3] See discussion of the Board's recent decision in *P. G. Berland Paint City*, 199 NLRB No. 145, 81 LRRM 1353 (1972) at page 17, infra.

As stated in the House Committee Report[4] accompanying the Bill which became Section 10(c), the purpose of that Section, submitted as an amendment to the Taft Hartley Act in 1947, was as follows:

> "[to forbid] the Board to reinstate an individual unless the weight of the evidence shows that the individual was not suspended or discharged for cause . . .
>
> The change made . . . is intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules and engage in incivilities and other disorders and misconduct . . . *The Board may not 'infer' improper motive when the evidence shows cause for discipline or discharge.*" (Emphasis added)

The "partial motive" approach also disregards the teachings and interpretations of this Court. In *NLRB* v. *John Brown, et al.*, 380 U.S. 278 (1965), this Court stated the fundamental test for discrimination cases of the type here at issue. Perhaps recognizing the inconsistencies and possible abuses of discretion inherent in a partial or divisible motive standard, the Court said at page 288:

> ". . . the Board must find from evidence independent of the mere conduct involved that the conduct was *primarily* motivated by an antiunion animus." (Emphasis supplied).

This Court's criterion was closely followed in the leading case of *NLRB* v. *Whitfield Pickle Company*, 374 F.2d 576

---

[4] See H. Repts. 80-1 Vol. 2-11119 at p. 42-3 (1947). While the House—Senate conferees subsequently deleted the "weight of the evidence" terminology from the bill because it was deemed to be surplusage, the record of debates shows no action was taken to disaffirm the purposes of the House bill as quoted above. See Congressional Record, Senate, June 6, 1947 at paragraph 6677, page 1594.

(5th Cir. 1967) where the familiar "but for" test was enunciated. Aptly recognizing that Section 8(a)(3) calls for an assessment of the real or determining motive behind an employer's allegedly discriminatory action, the Court said at page 582:

> "Where an employer fires a union sympathizer, the General Counsel must show by substantial evidence that 'in the absence of the union activities he would have treated the employee differently' ".

Against this background, the incongruity of the "partial motive" standard is apparent. The error of this approach was forcefully pointed out by the First Circuit Court of Appeals in *NLRB* v. *Fibers International Corporation*, 439 F.2d 1311 (1971) where the Court stated at pages 1311-12:

> "Examination of the NLRB's yearly reports shows that much more often than not we have enforced the orders of the Board. There is one area, however, where we have never seen eye to eye: the test for determining whether a discharge for established misconduct was in fact an unfair labor practice. Having in mind that a business decision is involved, it has been our position that the Board has the burden of making a clear showing that the employer's *dominant* motive was not a business one, but union animus." (emphasis supplied)

The Court continued (at page 1312, footnote 1):

> "So that there may be no misunderstanding about what we mean by dominant motive, we state it again. Regardless of the fact that enforcing the penalty may have given the employer satisfaction because of the employee's union activities, the burden is on the Board to establish that the penalty would not have been imposed, or would have been milder, if the employee's union activity, or a union animus, had not existed."

The Board petitioned the First Circuit to modify its use of the words "clear" and "dominant" in the foregoing deci-

sion. That petition was denied and the Court stated, 439 F.2d at 1315:

> "To dominate means to control. The 'dominant' motive is the controlling or effective motive. We use this particular word because of its insistent quality, to remind the Board that its burden is to find that the improper motive was the one that in fact brought about the result."
>
> * * *
>
> "With regard to our use of the word 'clear' we do not mean, as the Board fears, that its burden of proof on this issue is any greater than it is on any other. However, our experience has been that from time to time the Board not only forgets that '*partially* motivated' means *effectively motivated, but forgets that an aura of even strong union animus is not sufficient in itself, once an adequate and proper business reason has been established.*" (emphasis supplied)

The line of reasoning employed by the First Circuit in *Fibers* is also followed in decisions of the Ninth Circuit. For example, in the recent case of *NLRB* v. *West Coast Casket Company, Inc.* 469 F.2d 871 (1972) that Court observed:

> "To determine whether discharge violates Section 8(a)(3), 'the test is whether the business reason or the protected union activity is the *moving cause* behind the discharge'". (Emphasis added).

Standing in opposition to the foregoing cases are decisions of several circuits, including the Seventh, which maintain that even the slightest semblance of antiunion animus will invalidate an otherwise justifiable disciplinary action. See *S. A. Healy Company* v. *NLRB*, 435 F.2d 314, 316 (10th Cir., 1970) (violation "even if union activities are only a partial motive"); *NLRB* v. *Princeton Inn Co.*, 424 F.2d 264, 265 (3rd Cir., 1970) (violation if discharge "is

partially motivated by the employee's protected activity"); and *NLRB* v. *Gladding Keystone Corp.*, 435 F.2d 129, 131-2 (2nd Cir., 1970) (violation if "discharge was at least partially because of union activities").

Recent decisions of the Seventh Circuit indicate that it follows perhaps the most exacting standard of all: an employer's motivation for discharge must be solely and exclusively the product of legitimate business concerns. The Seventh Circuit's misinterpretation of the thrust of Section 8(a)(3) is apparent in *NLRB* v. *Symons Manufacturing Co.*, 328 F.2d 835, (1964) where the Court stated at page 837:

> "The mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated *solely* on those grounds, and not by a desire to discourage union activity." (emphasis supplied)

This polarization of approaches to Section 8(a)(3) cases, clearly evident in the above cited court decisions, has become even more pronounced as a result of a significant recent decision of the Board (handed down about a month after the Board's Decision and Order herein) wherein a radical departure from previous Board precedents has occurred. In *P. G. Berland Paint City*, 199 NLRB No. 145, 81 LRRM 1353 (1972) the Board held that an employer's discharge of a union adherent whom it regarded as "too dangerous" did not violate the Act even though the employer previously had displayed a "considerable animus" toward the employee because of his union activity. The Board stated at 81 LRRM 1355:

> "On the record it is fair to assume that the Respondent entertained a desire to get rid of [charging party], whose union activities it resented, and was pleased to have an opportunity present itself for doing so.

But that alone is not enough to establish that the discharge was in violation of Section 8(a)(3). *The mere fact that an employer may want to part company with an employee whose union activities have made him persona non grata does not per se establish that a subsequent discharge of that employee must be unlawfully discriminatory.* If the employee himself obliges his employer by providing a valid independent reason for discharge—*i.e.*, by engaging in conduct for which he would have been discharged anyway—his discharge cannot properly be labeled a pretext and ruled unlawful.

"Save where the reason itself is unlawful, it is not for the Board to substitute its judgment for that of management as to what constitutes proper cause for discharge. Unless the ground advanced is *inherently implausible*, is *unsupported by credible evidence*, or is proved by the record *to have been used disparately* on the basis of unlawful considerations, its rejection by the Board is *unwarranted*." (emphasis supplied)[5]

Manifestly, the Board, by its *Berland* decision, has at last moved toward a rational and proper approach to discrimination cases which should have been followed by the Seventh Circuit in the case at bar.

It is submitted that the issue raised here involves more than mere semantics. Employers and employees alike presently lack clear and settled guidelines by which to measure their rights and duties under the Act. Over 10,000 charges of employer discrimination or illegal discharge are lodged with the Board each year. See 36th Annual Report of NLRB, BNA Labor Relations Yearbook, 1972, at page 201.

---

[5] We submit that Petitioner's reasons for discharging Boyce were neither inherently implausible nor is there any evidence that Boyce was treated disparately. To the contrary, Boyce was discharged, in part, for the same reason that led to the discharge of three female employees before the onset of the Union campaign.

In such a setting, perpetuation of the bewildering and conflicting standards which now prevail can only serve to frustrate fair and effective administration of the provisions of the Act.

CONCLUSION

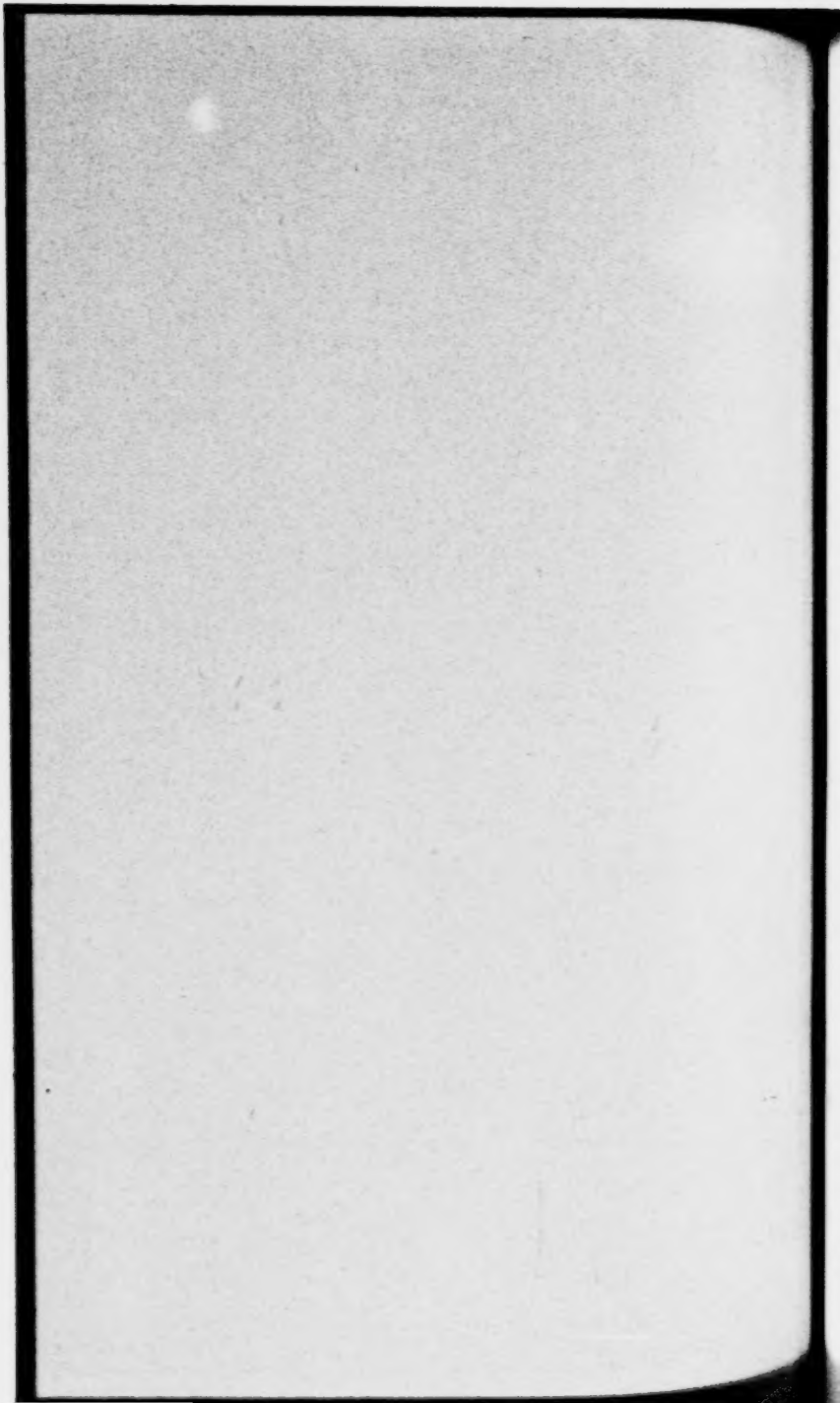
This Court should issue the Writ of Certiorari prayed for, and set aside the order here under review, not only to correct the injustice worked upon Petitioner, but also for the public good which would result from resolving the important questions presented concerning interpretation and application of the National Labor Relations Act.

Respectfully submitted,

THOMAS D. BURLAGE
SAMUEL W. WITWER, JR.
Attorneys for Petitioner

Of Counsel:

WITWER, MORAN & BURLAGE
141 West Jackson Boulevard
Chicago, Illinois 60603
(312) 427-8750



APPENDIX

DECISION OF TRIAL EXAMINER

(Issued May 16, 1972)

THE UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
No. 38-CA-1309 [1-2]

MILDRED BOYCE and INTERNATIONAL MOLDERS' and ALLIED WORKERS OF NORTH AMERICA, AFL-CIO,

Charging Parties

v.

IMPACT DIE CASTING CORPORATION,

Respondent

TRIAL EXAMINER'S DECISION

SAMUEL M. SINGER, Trial Examiner: This proceeding was heard before me in Yorkville, Illinois, on January 25-26, 1972, pursuant to charges filed on November 3 and 18, and complaint issued on December 9, 1971. The basic issues litigated were whether or not Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act through interference, restraint and coercion, and through discharging and refusing to reinstate an employee. All parties appeared and were afforded full opportunity to be heard and adduce relevant evidence and otherwise be heard. Briefs were received from General Counsel and Respondent.

Trial Examiner's Decision

Upon the entire record,[1] and from my observation of the testimonial demeanor of the witnesses, I make the following:

Findings and Conclusions

I. Respondent's Business; the Labor Organization Involved

Respondent, a Delaware corporation with office and place of business in Sandwich, Illinois, is engaged in aluminum and zinc die casting. It annually sells and delivers to purchasers in other States, and purchases and receives from sellers in other States, products valued in excess of $50,000. I find that at all material times Respondent has been and is engaged in commerce within the meaning of the Act.

International Molders' and Allied Workers of North America, AFL-CIO (the "Union") is a labor organization within the meaning of the Act.

II. The Unfair Labor Practices

A. Interference, Restraint, and Coercion

1. The organizational drive

In mid-August 1971[2] employee Mildred Boyce (the alleged discriminatee) spoke to Plant Superintendent Leon

---

[1] General Counsel's unopposed motion, dated March 3, 1972, to correct the transcript by substituting "October 18" for "October" at page 147, line 8, is hereby granted. It is further ordered that the transcript be corrected as follows: at page 4, line 7, substitute "avoid unnecessary" for "avoid reducing the"; at page 161, line 3, substitute "agrees" for "proposes"; and at page 250, line 21, substitute "concerns" for "reaches to."

[2] All dates are 1971 unless otherwise indicated.

Coquelin and then to Company President Carl Becker about a raise. Receiving no satisfaction, on April 24 Boyce obtained the name of a union organizer from a fellow employee and asked him what the plant employees "had to do to have . . . or join a union." The next day (August 25), Boyce again telephoned the organizer (John Grady, representative of Local 369), telling him that a "group" was ready to meet with him on Saturday, August 28, in the home of employees Haskell and Loreta Hill. At the meeting held on that day, attended by six or seven employees, Grady explained the purpose of a union, asked those present to sign authorization cards, and handed out literature and other cards for distribution among plant employees, cautioning them not to solicit on Company time. All signed authorization cards. Boyce later explained to employees in the plant what Grady had told her, showed them Union literature, and invited them to her home to sign cards.[3]

2. Plant Superintendent Coquelin and Company President Becker question employee Boyce concerning the Union campaign and her role in the drive; their request that Boyce not turn in signed authorization cards

On Tuesday, August 31, Plant Superintendent Coquelin came to Boyce's work area, showed her an unsigned Union authorization card, and asked if she "knew anything about it, and was [she] involved with this union stuff." Boyce said "no." Later that day, Company President Becker asked Boyce if she was still interested in a die casting job. When Boyce said "no"—a die caster had lost his arm that day—

[3] The above findings are based on credited testimony of Grady and Boyce.

Becker asked if she was "involved" in the Union activity; Boyce again denied she was.[4]

The "next day or so" Coquelin requested Boyce to come to his office, where—according to Boyce's uncontradicted, credited testimony—Coquelin told her that he "knew" she was holding authorization cards, and that [she] was involved in the Union"; and Coquelin asked her "to write down the major complaints of the people in the order of their importance," which she did. Coquelin thereupon asked Boyce "to hold the cards" and not turn them into the Union. Boyce replied that she could not do that without the card signers' permission. Later, after work, Boyce reported Coquelin's request to the card signers, but "no one cared to have their cards held" back. A "couple of days later," Boyce reported Coquelin's request to Company President Becker and explained "the reason the people wanted the union." Boyce testified credibly that Becker told her that he, too, "wanted to have the cards held, in fact to throw them in the pot and burn them, to get the union off his back."[5] Later

---

[4] Based on the credited testimony of Boyce. Although called by General Counsel at the outset of the hearing as a witness under Rule 43(b) of the Federal Rules of Civil procedure to testify on the issue of Boyce's discharge, Coquelin was not called by Respondent to contradict any of the alleged coercive statements attributed to him by Boyce and other employees. While admitting that Respondent had offered her the die caster position "possibly" a month before her discharge, Becker likewise did not deny Boyce's testimony that he questioned her about her union activity at that time.

[5] When asked on direct examination by his counsel whether he ever suggested that authorization cards "be burned," Becker first equivocated (as he often did at the hearing) that "I operated with guidelines at all times that would avoid that kind of comment." Pressed for a direct answer, he then denied making the remark. According to Becker, "guidelines" in his usage means "Free enterprise and the right to exercise your own judgment as to what is best for you" without "any threats" or "promises" or an "unfair practice as far as a human being is concerned."

in that day Coquelin told Boyce he "knew who the original seven people" were that attended the first Union meeting and where that meeting was held; and that he "would draw up a contract and keep the people from harassment or termination if they would keep their cards from being [turned in] to the International."

3. Becker's September 2 speech; his offer to correct grievances and suggestion to form a Company union

Company president Becker testified that on September 2 he shut down the plant and "asked all the employees on the various shifts" to assemble in order to hear a "brief" speech. According to Becker, he "simply informed them that [he] was aware of the [Union] activity," told them that he recognized their right to organize" but "didn't feel we needed a union to iron out any differences or grievances," and said that "from this point on" he and his supervisors would be "available for discussion of their problems," promising to maintain an "open-door policy". Boyce testified credibly that Becker also said that the plant was going through a growth process, explained "why an International Union would be bad for them at this time," and asked the employees "to get their cards back and form a shop union which would be better than an International." When Boyce asked about the procedure for forming a shop union, Becker replied that "an attorney would have to draw up papers

which would give the people the same rights as an International, except they wouldn't have to pay dues."[6]

Plant Superintendent Coquelin stopped Boyce as she was returning to work and told her (according to Boyce's credited, uncontradicted testimony) that he "didn't want anybody going to Carl Becker any more for anything," that the employees "had to come to him" thereafter, and that he (Coquelin) "didn't want even a union shop."

4. Coquelin's offer to protect employees from retaliation if they did not turn in their authorization cards

Shortly afterward, Coquelin called Boyce to his office and said he "would go ahead and form (sic) a contract if the people would hold their cards." Boyce answered she would have to consult "the people involved." Later that day, at Boyce's work station, Coquelin showed her "a typed paper guaranteeing protection for the people involved against harassment and termination" for past union activity, signed

---

[6] According to Becker, it was Boyce that initiated the discussion about forming "some form of company union," indicating that he had "no interest or knowledge" on that subject and told the employees he would discuss the matter with his attorney before answering the question. However, employee Helen Fogo testifying as witness for Respondent (she was also called by the General Counsel to testify on other matters), corroborated Boyce's testimony that Becker "suggested if we needed a union, a shop union would be better." I credit Boyce's rather than Becker's version of the September 2 speech.

by Coquelin and notarized by Becker's secretary.[7] Boyce then went to see Becker and asked if she could post a notice on the bulletin board about a meeting "to find out what [the employees] really wanted to do." Although answering Boyce he would let her know by the end of the day, Becker did not do so. Thereafter, a meeting was arranged for the following Sunday (September 6) at the home of Juanita DaRonco. The 15 employees present at that meeting decided to have their authorization cards turned in to the International Union. The next day Becker visited Boyce at her machine area and asked "how the meeting turned out." Boyce said no one wanted to have "their card . . . held" back.[8]

---

[7] As already noted, Coquelin did not contradict any of the coercive statements attributed to him. Becker's secretary, Sharon Ehmke admitted complying with Coquelin's request to type a handwritten document stating that "there would be no reprisal to anyone or any employee that had any activity in the union." However, Ehmke testified that the document was destroyed at Becker's request and was never shown to any employee. While crediting Ehmke's testimony that Becker disapproved the "contract," I do not credit her implicit claim that the document was not seen by Boyce, since Boyce accurately recalled the substance of the document and Coquelin did not take the stand to deny that he showed it to Boyce.

[8] Based on Boyce's credited testimony. Although Becker allegedly could not "positively recall" the incident, he conceded that it "could have occurred." According to Becker, he had discussed "union activity" with Boyce on "a couple of occasions" and frequently with other employees, but "only when they would approach [him] on a problem." Becker sought to convey the impression that in presenting various employee "problems" (including wages), Boyce (as Becker put it) "was bargaining, I gather, for two positions: One, recognition as spokesman of the people, and the other, a company union." He surmised that Boyce was deliberately withholding signed Union cards in her possession (instead of turning them into the Union) until she could obtain one of these objectives. I am unimpressed by Becker's speculative evaluation of Boyce's motives.

5. Becker's September letters to employees opposing unionization, offering to resolve grievances, and requesting card-signers not to turn them into the Union

On September 9, Respondent posted an "intra-plant letter," informing its employees that, in accordance with previous requests, a "Suggestion Box" was now available for complaints; and in the letter Becker commented upon various complaints received. On the same day, Respondent delivered to all employees a letter on the subject of "Union Activity," expressing opposition to unionization. Among other things, the letter stated that "we are interested in resolving our problems without calling in a middleman to represent you"; that the Company "strongly" urged employees whose cards have not yet been turned in to the Union "to request the return" of those cards; that the law does not require the Company to make concessions to even a certified union; that the Company "could not and would not agree to anything" that "would place [it] in a position where we could not meet competition" and jeopardize jobs; and that the employees could "speak directly with management" without a union to "collect a part of [their] earnings."

On September 14, Becker distributed another letter on "Union Activity," again outlining the Company's position; pointing to its past benevolent attitiude in regard to layoffs, employee discipline, unemployment and workmen's compensation matters, and assistance to needy employees; promising no reprisals for Union activity and, noting that "unions don't just happen to come to our door," that the Company is "making every effort" to find out their complaints and "correct them."

6. Coquelin's warning against card solicitation; his interrogation of employee Ralls

Employee Barr, a die caster, testified credibly that around the same time (second week of September), Plant Superintendent Coquelin, in the presence of other managerial officials (including Vice President Hebel), told him that he "didn't have no axe to grind with me and just don't push your luck with union cards." Coquelin went on to discuss other matters, "mainly about production."

According to Cynthia Ralls' uncontradicted, credited testimony, Coqueline approached her at her work station in October and asked "how the union meeting went." Ralls replied "I don't know. I didn't go to it." Earlier, in the beginning of the organizational drive in August (after Ralls had asked Coquelin what percentage of cards was needed to establish a union) Coquelin had asked Ralls "who had the cards and how many were out." He had also asked Ralls if Jim Rule, a die caster on the third shift, "had anything to do with it [the Union]."[9]

7. Becker's questioning of Boyce concerning her Union buttons

On October 15, Company President Becker telephoned Mrs. Boyce at her home regarding Boyce's request, placed in the Suggestion Box, for a copy of the Company Rules. Becker opened the conversation by asking, "Is this Union headquarters?" Becker later explained that he was "going to try to improve things for the people."[10]

---

[9] As already noted, Coquelin was not called to deny the conversations attributed to him. Ralls testified for Respondent as well as General Counsel.

[10] Admitting the substance of Boyce's above-described testimony, Becker attributed his choice of words to a "warped sense of humor."

During the lunch break on October 25, Becker and Coquelin visited employees Boyce and DaRonco while they were at a table in the cafeteria. After examining the two Union pins Boyce was wearing Becker cautioned Boyce that she could wear one of the pins bearing the inscription "Committee" with the Union name, but not the (silver) pin which bore only the Union name, characterizing the latter as a "membership button." When Boyce said, "I don't think it says member on it anywhere," Becker insisted that "You can't wear that until such time as the union is voted in." He also asked her where she got the buttons and suggested she check into whether or not she could wear them. Both employees admitted that they did not remove the buttons and continued to wear them throughout the organizational drive.[11]

8. Becker's pre-election letters and speech; the Union loses the election

On November 4, the Union filed a petition for an election among Respondent's production and maintenance employees. Shortly before the election, scheduled for December 3, Respondent wrote its employees two letters and made a speech appealing for the Union's defeat. The basic theme of Becker's December 1 speech (which, unlike the first September speech, *supra*, sec. A. 3 was read verbatim), was that the employees needed no union to speak for them;

---

[11] Becker admitted that he and Coquelin approached the two employees after he learned that they wore "some kind of union button." According to Becker, he merely told them "they owed it to themselves and to the Company to get an evaluation as to whether or not this was a fair practice, a proper thing." I credit the mutually corroborative testimony of Boyce and DaRonco.

and that, unlike the Company, an "outsider" could not advance their personal interests or provide them with job security. Becker pointed out that "in excess of thirty die casting firms in the Midwest have closed their doors in the past two years . . . most of which were unionized"; and emphasized that "employment . . . could be interrupted with the advent of a union where there is always the danger of strikes and work stoppages with consequent unemployment. This is not job insurance . . . this is built-in-job insecurity." Urging a "No" vote, Becker stated, "I repeat as I have stated before, give us the chance to work together to solve our problems together. You owe it to yourselves, you owe it to your Company, of which you are a part, and which has provided all of us with jobs for a number of years."

In his final communication—a letter the day before the December 3 election, Becker sought to rebut some of the Union's claims and reiterated points made in his previous day's speech, including emphasis on benefits they enjoyed "without a union, without union dues" and "the possibility of strikes and work interruptions" if the Union came in. Becker told them that the "Molders' Union had been involved in over 25 strikes throughout the country the last two years . . . at least 14 . . . within the last 6 months."

The Union lost the election, 34 to 39. On January 5, 1972, the Regional Office issued its certification of the result of the election, with the notation that the Union had withdrawn its objections to the election.

9. Conclusions

As Respondent stresses in its brief (pp. 12-14, 30), an employer is entitled to resist unionization of its plant by lawful noncoercive communications to employees. Most of

the statements of Respondent to its employees, in letters, as well as speeches, were within permissible bounds of protected free speech. Some of the remarks constituted legitimate responses to Union claims and propaganda. However, General Counsel contends that Respondent's statements, particularly those Respondent characterizes as "informal," (Resp. br. p. 14), include express or implied coercive remarks tending to restrain and interfere with its employees' statutory-guaranteed rights to self-organization and, hence, fall within the ban of Section 7 and 8(a)(1) of the Act. In determining whether the conduct or statements are violative of Section 8(a)(1), I have evaluated them in the light of the total situation, including the nature of the conduct, Respondent's hostility toward unionization, the high-ranking role of the managerial representative making the statements, and the reasonably inhibitory effect of such statements or conduct.[12] *N.L.R.B.* v. *Fishman and Sons, Inc.*, 278 F.2d 792, 796 (C.A. 3). The test as to whether certain employer conduct or statements are violative of Section 8(a)(1) turns not on the motive for the conduct (as in a discriminatory discharge case under Section 8(a)(3)—*infra*, sec. B.), but on its reasonable effect on the employees. "The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *N.L.R.B.* v. *Illinois Tool Works*, 153 F.2d 811, 814 (C.A. 7). In making this determination it is the reasonable "construction [to be given] by the listener" (*Hendrix Mfg. Co.* v. *N.L.R.B.*, 321 F.2d 100, 104 (C.A. 5), which is critical.

---

[12] In this connection, it should be noted that one of the two high managerial officials to whom employees attributed coercive statements (Plant Superintendent Coquelin) did not contradict those statements.

a. Under all of the circumstances, I find that the following conduct by Plant Superintendent Coquelin interfered or tended to interfere with, restrain and coercive (sic) employees in the exercise of their rights guaranteed by Section 7 of the Act:

(i) His August 31 interrogation of employee Boyce as to whether she "knew anything about [the Union], and was [she] involved with this union stuff." The fact that Boyce untruthfully replied "no" suggests that she interpreted the inquiry as coercive. See *N.L.R.B.* v. *Camco, Inc.*, 340 F.2d 803, 804 (C.A. 5). Nor was this and other interrogation described below accompanied by assurances against reprisals and stated business reasons for the inquiries.

(ii) Coquelin's next day's statement to Boyce that he "knew [Boyce] was holding authorization cards and that [she] was involved in the Union"; and his request that she list the chief employee complaints. Coquelin's statements tended to create the impression that the employees' union activities were under surveillance.

(iii) His requests (on the same and subsequent days) that Boyce not turn in signed authorization cards to the Union—requests tantamont to soliciting withdrawals from the Union.

(iv) Coquelin's promises and statements that he could draw up a "contract" protecting card-signers from retaliation and harassment by Respondent if they did not turn in their cards to the Union; and his subsequent draft of such "contract" and display thereof to Boyce.

(v) Coquelin's statement to Barr not to "push your luck with union cards," thereby implying threats of reprisals for continued union activity.

(vi) His August 31 interrogation of employee Ralls concerning the identity of employees holding cards and whether a named employee (Jim Rule) "had anything to do" with the Union.

(vii) His subsequent inquiry of Ralls as to "how the union meeting went," prompting Ralls to deny attending the meeting.

b. I find that the following conduct by Company President Becker interfered, or tended to interfere with, restrain and coerce employees in their right to self-organization guaranteed by Section 7 of the Act:

(i) His August 31 questioning of Boyce if she was "involved" in Union activity.

(ii) His subsequent statement to Boyce not to turn in Union cards, "to throw them in the pot and burn them," and "to get the Union off his back."

(iii) His request in his September 2 speech to employees "to get their cards back" from the Union and to "form a shop union which would be better than an International."

(iv) Becker's request of Boyce as to "how the meeting turned out" in the home of Juanita DaRonco.

(v) His statement in the September 9 letter to employees "strongly" urging employees whose cards have not yet been turned in "to request the return" of those cards.

(vi) His October 25 questioning of Boyce and DaRonco concerning the Union buttons they wore and statement to Boyce that "you can't wear [one of the two buttons] until such time as the Union is voted in."

c. I expressly find the following statements and conduct

non-coercive and privileged free speech or legitimate agreement:

(i) The bulk of Becker's September 2 speech, among other things, urging employees to oppose unionization and promising to maintain an "open door policy" to receive complaints regarding working conditions.

(ii) The bulk of Becker's September 9 letter, among other things, opposing intervention of "a middleman" or outsider in dealings with management; and stating that if a union were voted in Respondent could not be forced to make concessions nor agree to anything that might jeopardize its own economic position or its employees' jobs.

(iii) Becker's September 14 letter pointing to Respondent's past benevolent attitude and existing benefits.

(iv) His November 23 letter commenting on the upcoming Board election and appealing for a "no" vote.

(v) His December 1 speech, repeating and amplifying on previous reasons for voting against the Union in the Board election, including his reference to the dangers of work-interruption and strikes in the event the Union came in.

(vi) His similar, but briefer, remarks in his December 2 letter to the employees.

B. The Discharge of Mildred Boyce

1. Boyce's employment and Union activities

Boyce was hired as a trim press operator in August 1968 at $1.60 an hour. A few months later she was transferred to the booster cup machine at $1.80 an hour. When terminated on November 8, 1971, she was a mill and lathe operator at $2.30 an hour, "the highest paid woman" in the production

machining department, working under Plant Superintendent Coquelin. As previously noted (see A. 2), about 2 months prior to her separation (after advent of the Union), Company President Becker offered to make her a die caster (a job she had asked for), but Boyce's desire for the job had waned when one of the male operators lost his arm at it.[13]

The record establishes that Mrs. Boyce was the instigator and sparkplug of the organizational drive. It was she who contacted Union Representative Grady and arranged for him to meet the first group of employees. She signed her Union card at the first (August 28) organizational meeting, distributed cards and literature, and encouraged employees to join the Union—inviting many to her home for that purpose. It was also Boyce who held on to and passed the signed cards on to Union Representative Grady. She attended all but one of the seven Union meetings.

That Respondent was aware of her active and leading Union role is beyond dispute. Plant Superintendent Coquelin and President Becker looked upon her as the kingpin of the drive. Indeed, when Becker called her at home (3 weeks before her discharge), he admittedly opened his conversation with, "Is this Union headquarters?" From the very outset of the drive, Coquelin had marked her a collector and custodian of the Union cards, seeking to prevail upon her not to turn in the cards to the International in return for a "contract" guaranteeing the card-signers security against Company retaliation and harassment. Also at the outset of the drive, it was to Boyce that Coquelin turned to ascertain the employees' complaints leading to the Union

---

[13] According to Becker, Boyce was offered the position around a month before her discharge.

movement. And Boyce was the chief target of both Becker and Coquelin not only as regards to soliciting withdrawals from the Union, but also as to coercive interrogation on the identity of unionists, attendance at meetings, wearing of Union buttons, and giving the impression of surveillance over Union activities.

2. Company President Becker's instructions to supervisors "to get rid of" Boyce because of her union activities

The credited testimony of General Foreman Gibson shows that even as early as the last week of August, Becker at a management meeting characterized Boyce as a "trouble-maker and union organizer," whom the Company had "to get rid of"; Coquelin "agreed" with Becker. Echoing this theme, a "couple of weeks later" (in September) Coquelin commented to Gibson, as he saw Boyce passing by, "You got to get rid of that fat ass. She is a trouble-maker and an organizer, a union organizer." Gibson testified credibly and without contradiction that Coquelin had instructed him to watch certain unionists, including Mrs. Boyce, during breaks and lunch periods to "keep them from getting together and signing union cards and organizing."[14]

---

[14] Coquelin was unexplainedly not called to rebut Gibson's testimony. Although Becker was rather vague as to whether Boyce was discussed at management meetings, at one point he conceded that "I can't deny that we didn't discuss Mildred from time to time because she was making demands. She was looking for recognition, and she was creating problems internally" and therefore was a natural subject of conversation. In answer to a leading question on direct examination, Becker denied saying that Boyce had to be fired because she was a union organizer. I have already noted my reservations concerning Becker's reliability as a witness (*supra*, fns. 5, 6, and 8. On the other hand, Gibson—no longer employed by Respondent at the time of the hearing and (unlike Becker) without

3. The November 8 discharge

At about 2:30 p.m. on November 8, Mrs. Boyce was called into Plant Superintendent Coquelin's office. There, in the presence of Company Vice President Hebel, Coquelin told her that she was being discharged "for falsifying an insurance claim." As detailed below (sec. B. 4.a), Boyce had filed a claim for medical benefits on behalf of her injured 3-year old son. When Boyce asked Coquelin what he meant by "falsifying" a claim, Hebel told her (as he testified at the hearing) that "there was a question as to whether or not any other application or claim had been made and she had stated no," although her husband "had made a claim" for the same injury. When Boyce asked, "Do I get some sort of paper to show I was terminated," Coquelin said "no" and told her to get her personal belongings and get out at once. Although Coquelin testified that he had no opportunity to get into other reasons for discharge because Boyce began to cry and left the room, Hebel testified that Coquelin "specified" only "one reason" and, as far as he knew, "attempted" to give no "other reasons" for her discharge; and, additionally, that he himself gave no other reason either.

On the same day (November 8), in a memorandum of the discharge interview for the Company records, Coquelin specified no ground for discharge other than "falsification

---

personal interest in the outcome of this proceeding—impressed me as an honest and credible witness. Neither the record nor Gibson's testimonial demeanor supports Respondent's post-hearing characterization of Gibson as "a disgruntled former supervisor who was involuntarily terminated by Respondent" (Resp. br. p. 28). The undisputed evidence shows that although Gibson's job on the day shift was eliminated (for reasons undisclosed in the record), he was offered another job (the foreman's position on the midnight shift) which he chose not to take, instead leaving voluntarily.

of an insurance form"; nor did Becker in his prehearing affidavit dated November 30, wherein he likewise stated that after consultation with counsel "we terminated Mildred Boyce's employment for falsifying an insurance claim."[15]

4. The asserted reasons for Boyce's discharge advanced by Respondent at the hearing

Although, as indicated, the only reason given Boyce in the November 8 discharge interview was her alleged falsification of an insurance claim, at the hearing Respondent added various other grounds in alleged justification of the discharge. According to Company President Becker, the three "prime" reasons were "[l]eaving the work station, which involved her poor performance in production . . . the insurance claim, and . . . soliciting union membership on company time." He later further added "her general attitude towards her work, towards supervisors, the harassment of fellow employees, by practicing slander and gossip" and "abuse of some people's personal property." According to Plant Superintendent Coquelin "harassment, falsifying an insurance claim, and wasting time on company property [were] the three main ones", then adding that her drop in production was a contributing factor. Becker testified that he had consulted with Coquelin and Vice President Hebel (in charge of manufacturing) 3 or 4 days before he finally decided to discharge Boyce on November 8. According to Hebel, he himself did not "recommend" discharge, but "agreed to it." Before actually taking the discharge action, Becker, as he testified, decided to consult

[15] Coquelin's November 8 memorandum corroborates Boyce's testimony that after Hebel explained "the reason" for her discharge (i.e., "falsification" of an insurance claim) she asked for, but was denied, a "termination slip" showing the reason.

with counsel, "because of the obvious reasons involving her activities in the union." According to Becker, "Counsel advised me under the circumstances we were taking a considerable risk in being accused of terminating Mildred for union activity," but he nevertheless directed Coquelin and Hebel to terminate her. While Becker testified that he told Coquelin "to explain to Mildred the reasons why she was being terminated," Coquelin denied that he did, explaining, "He didn't have to, I knew that."

We now proceed to the various reasons advanced for the discharge—first to the insurance "falsification" claim.

a. The alleged falsified insurance claim

Respondent's employees are covered by a group health-accident policy issued by Provident Life and Accident Insurance Company under which Respondent contributes for employee coverage and the employees for dependents' coverage. On July 21, Boyce executed a form for hospital and related medical costs in relation to an injury (second degree burns to both hands) suffered by her 3-year old boy. Boyce listed the name and place of work of her "husband" (Robert E. Boyce), but in answer to the question whether "any of the expenses for which claim is being made [was] covered" by any other group insurance (Question No. 9), she marked the box "No." At the time her "husband" was also enrolled in another group insurance program through his own employer (Model Industries) which also provided such benefits for dependents; on July 29 (8 days after Mrs. Boyce signed her application) he likewise filed a claim with his employer's insurance company ("Zurich") covering the injury to the boy. Zurich received the "husband's" claim on August 2 and paid it on August 4. Although the total claim amounted to $406.20, only $369.20 was allowed by Zurich

under the "basic plan"; the remaining $10, representing "supplemental major medical" expenses was disallowed because the $100 deductible had not yet been "satisfied." Mrs. Boyce testified credibly that it was not until early August that she became aware that Robert, who is her "common-law husband," had filed the claim for benefits and had been paid thereon. The record establishes that the relationship between Mildred and Robert was a tenuous one, with Robert periodically leaving her—a fact known to Respondent, including Company President Becker, who testified he knew Robert's "tendency to go out on a bender now and then and leaving Millie holding the bag;" and he recalled occasions when the Company "put up the money" to avoid a "shut off" of Mrs. Boyce's household utilities. Mildred first learned that her husband collected the insurance money from Zurich when Respondent's office girl (Sherry Ovitt) brought Mrs. Boyce's July 21 claim form in early August to make a correction and Mildred seized the occasion to inquire why "the bill hadn't been paid yet." When told that her husband "had already collected," Boyce asked whether Respondent's insurance company (Provident) would pay any unpaid balance. Ovitt said "they wouldn't pay anything." There is no reason to believe that Mrs. Boyce had ever received a copy of the group policy covering her or that she was aware of any "excess" exclusionary provision therein.

According to her credited testimony, Mrs. Boyce then tried to get her husband to pay the hospital and doctor bills, but he refused to do so. Meanwhile she continued "to inquire" about the payment of the claim by Provident, until she finally consulted an attorney on October 7 "to see what [her] legal rights were." After telling her husband that the attorney had advised her that he was liable for the hos-

pital and doctor bills if he claimed the child "as his," then and then only the husband "went ahead and paid the bill."

Company President Becker testified that the Company was first "alert[ed]" about the "dual" benefit claims when Mrs. Boyce herself gave Plant Superintendent Coquelin her attorney's October 7 letter in order to show that she had to absent herself from work in order to consult her attorney regarding her insurance claim. Coquelin himself noted on the letter that Mrs. Boyce had requested permission to take time off because her husband had deserted her, taking with him the "insurance check which was to be used to pay" the injured child's bills. Becker immediately notified Provident of the possibility of duplicate claims which, upon investigation, learned of Zurich's previous payment to Mr. Boyce. In the meantime, Provident had issued and forwarded to Respondent two checks ($366.20 payable to the hospital and $32 to Mrs. Boyce) on Mrs. Boyce's claim which it asked to be returned. Becker returned the checks after insisting that Provident put its request in writing which Provident did, taking the position in its November 2 letter to Becker that Zurich, as the "primary" carrier (i.e., insurer of the "father"), was primarily responsible for payment of the claim. However, a Zurich representative, Kussman, testifying at the hearing as an insurance expert, swore that as the "secondary" carrier it was Provident's obligation to pay Mrs. Boyce the $10 withheld by the "primary" carrier (Zurich), since Mrs. Boyce was entitled to 100 percent recovery of expenses in view of the alleged duplicate coverage and "coordination of benefits" provisions in both Zurich and Provident policies. He further testified that where, as in this case, the wife's claim disclosed that her husband was employed elsewhere, it was "the responsibility of the secondary carrier [Provident], not the

primary carrier [Zurich]" to check on the existence of duplicate coverage. He indicated that before Zurich paid the claim to Mr. Boyce, Provident was notified of that claim and information as to coordination of benefits was exchanged.

b. "Harassment" and "verbal abuse" of other employees

On September 3, Respondent received written notes from two employees complaining that they had heard (from other girls in the plant) that Mrs. Boyce had referred to them as "queers" and "female companions." One of these testified that this had also happened a year and a half ago and that she "figured twice was enough." The other employee's recollection was that this had started "about six months ago"; however, she brought out that Boyce herself had cautioned her about other girls circulating this kind of rumor. Although the first employee testified that she quit on the same day she wrote the note (September 3) because of the accusation, she admitted being on the lookout for another job, closer than the 30 miles from her home to Respondent, as long ago as 2 years before this, explaining that driving 60 miles a day "was kind of expensive." Several days after quitting Respondent, she did in fact obtain the job about which she had inquired 2 years earlier, the new job being only a mile from her home and at higher pay (i.e., at $3.97 as opposed to $2.20 an hour).

A third employee testified that she went to see Company President Becker around September 9 to complain about Boyce's "continual harassment" of her by calling her "filthy, rotten things." According to this employee, Boyce also made personal remarks about an alleged marital relationship. The same employee testified, however, that this "harassment" dated back to when Boyce first came to the

plant (August 1968) and that it actually abated during the Union organizational drive (August 1971) when Boyce "didn't say anything much" to her. Moreover, she admitted that she had heard "vile" language of the type attributed to Boyce used by others, as well, "many times" in the plant; and that another girl (identified by name) who had worked in the plant before the advent of the Union, had also called her "names" and accused her of extramarital relationships. When asked at the hearing why she had waited or happened to complain to Becker on September 9, 1971—only after the Union campaign started—her reply was that since Boyce "said she was being discriminated against" on account of the Union, "so I figured I was being discriminated against by [Boyce]." Later, she admitted that an anonymous phone call to her husband accusing her of alleged sexual indiscretions also prompted the visit to Becker, but conceded that she could not attribute the telephone call to Boyce.

On September 24, Becker signed an "Employee Warning Notice" directed to Boyce, indicating that Becker had already warned her verbally for violating Company Rule 9[16] on September 9 and that "[f]urther harassment of fellow employees will be acted upon by the company."[17]

---

[16] "Making a false or malicious statement about or against another employee, supervisor and/or Company."

[17] After close of the hearing, Respondent filed a motion to introduce into the record or to take "judicial notice" of a December 27, 1971 decision by the Equal Employment Opportunity Commission (based upon its District Director's findings of fact) "for the sole and limited purpose of demonstrating that other of its employees have been disciplined for asserted violations" of Company Rule 9. In the case in question three female employees claimed that Respondent "acted discriminatorily because of their sex in that a male employee was similarly accused but not discharged" for sending an

c. Alleged solicitation of employees during working time

Employee Stoudt, a laborer, testified that Mrs. Boyce twice asked him to sign a card (or join the Union) in September. According to Stoudt, the first time (September 22) he was standing by his machine smoking and "waiting" for buckles to be washed; the second time (September 23), he was again washing buckles and waiting for the machine to finish its cycle. Both Stoudt and Boyce worked side by side, only a foot apart. On September 23, Stoudt handed a note to Plant Superintendent Coquelin briefly mentioning these incidents and stating that he did not want "to be bothered" by Boyce. He admitted, however, that Boyce had never actually offered him a card, that he did not know her break times, and that he did sign a Union card about a week later when another male employee handed him one. Mrs. Boyce

---

anonymous obscene letter to a fellow employee. The Commission upheld Respondent's contention that the three employees were discharged for "almost daily" harassment and verbal abuse of a fellow female employee at her work station, restrooms, and during breaks; that the subject matter of such abuse "was an alleged extramarital relationship between the female employee" and a plant supervisor; and that the abusive treatment interfered with the work of their target. It accordingly held that the terminations fell within the normal "management prerogative" area and that the sex of the dischargees "was not a motivating factor."

Respondent's motion to introduce the December 27, 1971 Commission's decision and the District Director's "findings of fact," to which no opposition was filed, is hereby granted, all documents (the Motion, Commission's decision, and District Director's findings) being marked as Respondent Exhibit No. 14. While these documents are relevant in that they tend to show that Respondent had disciplined employees for violation of Company Rule 9, they are not conclusive on the issue whether any alleged violation of Rule 9 was a motivating factor in the discharge of Boyce.

admitted only asking Stoudt whether he was "still interested in signing a card," claiming that Stoudt already had gotten one from another solicitor. She testified credibly that she was on her "break" time when she put the question to Stoudt and, as Stoudt himself indicated, that he was not actually working at the time.

On October 26, Respondent issued a warning notice to Boyce (signed by Coquelin and Foreman Gibson) stating that "it had been called to our attention that you have been engaging in Union solicitation in the plant during working time. Specifically, that you have approached [employee] Herrera on Friday, October 22 at approximately 3:35 p.m." Boyce was admonished that further solicitation "during your working time or time when solicited employees are at work . . . will lead to appropriate disciplinary action . . . including possible suspension or discharge." Boyce denied the incident, asserting that she "never" approached Herrera during or off-duty hours, that she could not even communicate with him because he spoke only Spanish, and that she knew as a fact that Herrera already had been signed up by another card-solicitor (Bill Chaney). Herrera was not produced to conradict or dispute Boyce's testimony. I credited her version of the incident.

d. Other alleged derelictions

As noted *supra* (sec. B.4), in addition to the above alleged misconduct, Becker and Coquelin claimed that certain other behavior contributed to Boyce's discharge. Thus, Coquelin testified that "wasting time" and "loitering" on Company property were one of the "main" reasons for her discharge. In its brief (p. 8), Respondent cites only one employee who purportedly "observed Mildred Boyce in the washroom almost every time she went in and she was subjected to

vile language by Mrs. Boyce on those occasions." The reference is to the testimony of an employee already discussed *supra* (sec. B.4.b.). On October 12 Coquelin issued a warning notice to Boyce based on this conduct, admonishing that "further violation of the rule will result in further disciplinary action or possibly discharge."

Both Becker and Coquelin at first attempted to portray Boyce as a "poor" producer, Coquelin stressing that her production "dropped terrifically" since 5 or 6 months before her discharge because she "was spending" too much time in the washroom away from her machine. However, when pressed further on the subject, Coquelin admitted that her production remained "average" and, after being shown his pre-hearing affidavit, that it was indeed "good."

Finally (as shown *supra* sec. B. 4.), Becker testified that "attitude towards her work, towards supervision" and "abuse" of property also entered into the decision to discharge Boyce. However, the record is devoid of evidence supporting this allegation and Respondent in its brief refers to none.

5. Conclusions

This case presents the usual issue in discharge cases; namely, the employer's motive in dismissing and refusing to reinstate an employee. As is in typical cases of this nature, the General Counsel relies heavily on the Employer's anti-union animus and on the Union role of the dischargee; on the other hand, the Employer urges that it had justifiable cause for terminating the employment. However, as we have been repeatedly told, while an employee's being "an ardent supporter and protagonist of the Union does not insulate [him] against discharge for justifiable cause . . . the existence of valid grounds for discharge is no defense

. . . when discriminatory motive is a factor in the employers' decision." *Sweeney & Co.* v. *N.L.R.B.*, 437 F.2d 1127, 1133 (C.A. 5). "The mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity." *N.L.R.B.* v. *Symons Mfg. Co.*, 328 F.2d 835, 837 (C.A. 7). "[A]ll that need be shown [By General Counsel] is that the employee would not have been fired but for the anti-union animus of the employer." *N.L.R.B.* v. *Whitfield Pickle Company*, 374 F.2d 576, 582 (C.A. 5). Viewing the record as a whole I am persuaded that Respondent would not have terminated Mrs. Boyce on November 8 but for the fact that she was the prime mover, if not the very embodiment, of the Union drive which Respondent admittedly opposed with all the vigor at its command. In any event, it is clear that Boyce "was discharged at least in part because of Union activity." *N.L.R.B.* v. *Tom Wood Pontiac, Inc.*, 447 F.2d 383, 386 (C.A. 7).

It is unnecessary to repeat at length the evidence demonstrating Respondent's strong hostility to self-organization (*supra*, sec. A.). While Respondent, as it had the right, made legitimate appeals to turn down the Union, credited evidence (much of it undisputed) demonstrates that it also resorted to unlawful and coercive measures to wean its employees away from "outside" Union affiliation. To this end, it interrogated employees concerning their Union sympathies and attendance at meetings, solicited withdrawals from the Union, promised Union employees protection against reprisals if they did not turn in Union cards, warned at least one union solicitor not to "push your luck with union cards," and suggested formation of a "shop union" in place of an "outside" union. The record also

establishes (*supra*, sec. B. 1) that Boyce was the instigator and sparkplug of the organizational drive, that Respondent was fully aware of her leading role, and that it dealt with her in recognition of that role in seeking to prevail upon the employees to abandon the Union. Boyce also was the chief target of Company President Becker's and Plant Superintendent Coquelin's coercive conduct. Finally, there is the uncontradicted credited evidence (*supra*, sec. B. 2), that Coquelin told one of the foremen (Gibson) that Respondent must "get rid of Boyce because she was 'a troublemaker and . . . union organizer' "; and that she and other Unionists must be kept apart even during breaks and lunch periods to discourage Union solicitation and organizing. This, then is one of those cases where "[d]irect evidence of a purpose to discriminate is rarely obtained." *Corrie Corporation of Charleston* v. *N.L.R.B.*, 375 F.2d 149, 152 (C.A. 4).

As we have seen, the reasons President Becker and Plant Superintendent advanced for Boyce's discharge at the outset of the hearing (sec. B. 4) were many and varied. These included alleged "falsification" of an insurance claim, harassment and verbal abuse of other employees, solicitation of employees during working time, "wasting time" and "loitering" on Company property, "poor" production, undesirable "attitude" towards work and supervision, and "abuse" of property. To be sure, these grounds (or any of them) could well have immunized the discharge, if the *true* motivating factor therefor, since an "employer may terminate an employee for no reason or for any reason other than union or other protected activity." *Amalgamated Meat Cutters etc., Local No. 364 (Point St. George Fisheries, Inc.)* v. *N.L.R.B.*, 435 F.2d 668, 671 (C.A. 9). See also *Spotlight Company, Inc.*, 192 NLRB No. 70 (TXD p. 13).

However, I have difficulty in believing that Boyce's Union role was not a significant and controlling determinant in Respondent's decision to discharge her. To begin with, Respondent communicated only *one* reason at the time of the discharge—namely her alleged falsification insurance claim—a factor casting suspicion on the bona-fides of the many additional reasons given for the first time at the hearing. Cf. *N.L.R.B.* v. *Sawyer Downtown Motors, Inc.*, 213 F.2d 514, 516 (C.A. 7); *N.L.R.B.* v. *Smith Victory Corp.*, 190 F.2d 56, 57 (C.A. 2).[18] Moreover, reasons advanced at the hearing were conflicting (Becker relying on some reasons such as union solicitation on Company time which Boyce's immediate supervisor Coquelin did not mention), varied in emphasis, and in some cases were totally unsupported or false (e.g., claimed poor production, undesirable work attitude, and "abuse" of property). "The Company's vacillation and the multiplicity of its alleged reasons for firing [Boyce] render its claim of nondiscrimination the less convincing." *N.L.R.B.* v. *Schill Steel Products, Inc.*, 340 F.2d 568, 573 (C.A. 5). So do the inadequacy and falsity of its assigned reasons. See *N.L.R.B.* v. *Dant*, 207 F.2d 165, 167 (C.A. 9); *N.L.R.B.* v. *I.E.B.W., Local Union 340 (Walsh Construction Co.)*, 301 F.2d 824, 827 (C.A. 9).

Thus, as to production, Coquelin admitted, as he stated in his pre-hearing affidavit, that Boyce's production remained "good" at the time of discharge. As to union solicitation during working time, Respondent did not produce

---

[18] An "employer is in an unfortunate position in attempting to justify to the Board its [conduct] for a reason that apparently did not occur to it prior to the time of the hearing." Cf. *Polish National Alliance* v. *N.L.R.B.*, 136 F.2d 175, 181 (C.A. 7), aff'd. 322 U.S. 643.

Herrera to contradict Boyce's testimony that she never approached him during or off-duty hours; and the alleged solicitation of Stoudt, even if it occurred as described by Stoudt (but denied by Boyce) amounted to nothing more than a request to sign a card while Stoudt was "waiting" and doing nothing at his work station and (as Boyce testified) while she was on her break time. As to "harassment" and "verbal abuse" of employees, the "filthy, rotten" remarks attributed to Boyce, even according to the employee's own testimony were not of recent vintage and the name-calling (not uncommon in the plant) dated back to the period prior to advent of the Union. While two other employees complained that Boyce had referred to them as "queers" and "female companions," this was derived from pure alleged hearsay from others with no direct evidence linking Boyce to the claimed remarks; moreover, according to the affected girls' own testimony, the statements in question were made once before the Union drive, with apparently no issue raised.

Finally, as to Boyce's "fraudulent" insurance claim, it is true that Boyce untruthfully indicated on the claim form that no other group insurance applied to her family; but, contrary to Respondent, under the circumstances shown, I find that by doing so she did not attempt deliberate "deception" upon Respondent or its insurance carrier (Provident) in order to obtain a second or double payment for injury suffered by her son. To begin with, Mrs. Boyce disclosed on the face of the form that her "husband" was employed (by a named employer) and, as the record indicates, even a superficial check would have revealed that the husband was also enrolled in some group insurance program which might or might not have "also" covered the claim. Nor did Mrs. Boyce know that her common law husband had also

filed a claim for the benefits (admittedly after she did). It was not until early August, when Respondent's office girl mentioned that the husband already collected on the claim that she learned of the other claim. Not only was Respondent's office already aware of the "husband's" claim, but so was its carrier (Provident) which did nothing to coordinate the benefit payment between itself at the "husband's" carrier (Zurich). Boyce neither retained nor received any actual payment herself. While neither did anything to stop further processing of Mrs. Boyce's claim, Boyce attempted to prevail upon the "husband" to pay the outstanding hospital and medical bills, which he refused to do. She thereupon consulted an attorney—a fact which she herself made known to Plant Superintendent Coquelin. According to Company President Becker, it was only at this stage that he personally learned of the existence of "two" claims (although his office girl had known of this back in early August) and he immediately alerted his insurance Company—which, as indicated, was already apprised of this. It is evident that Boyce only wanted the medical bills paid once, without concern as to which insurer paid them. The fact is that, confronted with her attorney's instructions, Mr. Boyce did pay the bills, that Mrs. Boyce did not secure double payment, and that she apparently was (and is) still entitled (but has not received) a small ($10) payment from Respondent's insurance Company (Provident) over and above the payment received by her husband from his insurance company (Zurich). If Mrs. Boyce had intended to defraud Respondent or its insurance company why would she have disclosed (on the claim form) the fact that her husband was employed, that she had been trying to get him to pay the bills, and that she went to the extent of consulting a lawyer to force him to pay them? Mrs. Boyce's basic purpose was clearly to make sure that the hospital and

medical bills were satisfied whether it be through her husband's or her own insurance coverage. The fact that Provident did nothing to coordinate the benefit payment between itself and Zurich suggests that Provident itself may have been remiss in its processing of Mrs. Boyce's claim.

For all of the foregoing reasons and the entire record, I find that Respondent's claimed reasons for discharging Mrs. Boyce were pretexts to cloak the true ground for the discharge, namely, her leading and outspoken Union advocacy. I conclude that General Counsel met the burden of establishing that the discharge was, in substantial and controlling part, motivated by union animus, in violation of Section 8(a)(3) and (1) of the Act.

Conclusions of Law

1. By coercively questioning employees concerning their Union sympathies and activities, by soliciting withdrawals from the Union, by telling an employee not to wear a Union button, by impliedly threatening another one with reprisals if he continued Union activity, by creating the impression that the employees' union activities were under surveillance, and by suggesting that its employees form a "shop union," Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7, in violation of Section 8(a)(1), of the Act.

2. By discharging Mildred Boyce on November 8, 1971, and thereafter failing or refusing to reinstate her, in order to discourage Union activities, Respondent has discriminated in regard to hire and tenure of employment, in violation of Section 8(a)(3) and (1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. It has not been established that Respondent has violated Section 8(a)(1) by other acts or conduct alleged in the complaint.

The Remedy

The Recommended Order will contain the conventional remedial provisions in cases involving findings of interference, restraint, and coercion, and discriminatory discharges, in violation of Section 8(a)(1) and (3) of the Act. These will require Respondent to cease and desist from the unfair labor practices found, and to offer reinstatement with backpay to the employee discriminated against. In accordance with usual requirements, reinstatement shall be to the discriminatee's former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges. The discriminatee shall be made whole for any loss of earnings she may have suffered by reason of the discrimination against her by payment to her of a sum of money equal to that which she normally would have earned from the date of discharge (November 8, 1971) to the date of a valid offer of reinstatement, less net earnings during such period, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

As found *supra* (sec. B. 4. c.), based on a report that Boyce on October 22 solicited an employee (Herrera) during working time, Respondent on October 26 issued her a warning notice admonishing her that further solicitation "during working time . . . will lead to appropriate disciplinary action . . . including possible suspension or discharge." Since, as further found, it has not been established that Boyce solicited Herrera during working time, the recommended order will, as General Counsel requests (br. p. 24),

also provide that Respondent remove and expunge this warning notice from its records.

In view of the nature of the unfair labor practices Respondent has engaged in, I shall recommend that it be required to cease and desist from infringing in any manner upon rights guaranteed employees by Section 7 of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[19]

ORDER

Respondent, Impact Die Casting Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively questioning employees concerning their union sympathies and activities; soliciting them to abandon or withdraw from a union of their choice; telling employees not to wear Union buttons; directly or impliedly threatening them with reprisals for engaging in union activities; creating the impression that their union activities are under surveillance; suggesting that they form a shop union as opposed to affiliating with an existing union; or in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

---

[19] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

(b) Discouraging membership and activities in Local 369, International Molders' and Allied Workers of North America, AFL-CIO, by discriminating in regard to hire and tenure of employment of Respondent's employees or by discriminating in any other manner in regard to any term or condition of their employment, in order to discourage membership or activities therein.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Mildred Boyce immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of pay she may have suffered as a result of her discharge, in the manner set forth in The Remedy section herein.

(b) Remove and expunge from its records the written warning notice issued to Mildred Boyce on October 26, 1971.

(c) Notify the above-named employee if presently serving in the Armed Forces of the United States of her right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its plant in Sandwich, Illinois, copies of the attached notice marked "Appendix."[20] Copies of said notice, on forms provided by the Officer-in-Charge for Subregion 38, after being duly signed by Respondent's representatives, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify said Officer-in-Charge, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[21]

IT IS FURTHER ORDERED that the complaint be dismissed in all other respects.

Dated at Washington, D. C.

/s/ SAMUEL M. SINGER
Samuel M. Singer
Trial Examiner

---

[20] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[21] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Officer-in-Charge, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

NOTICE TO EMPLOYEES

Posted By Order of the National Labor Relations Board
An Agency of the United States Government

After a trial before a Trial Examiner of the National Labor Relations Board, at which all sides had the chance to give evidence, it has been decided that we, Impact Die Casting Corporation, violated the National Labor Relations Act, and we have been ordered to post this Notice.

The National Labor Relations Act gives you, as an employee, these rights:

To engage in self organization

To form, join, or help unions

To bargain collectively through a representative of your own choosing

To act together with other employees to bargain collectively or for other mutual aid or protection; and,

If you wish, not to do any of these things.

Accordingly, we give you these assurances:

WE WILL NOT do anything that interferes with any of your rights listed above.

WE WILL NOT coercively question you concerning your union sympathies and activities; nor solicit you to abandon or withdraw from a union of your choice; nor improperly request you to remove union buttons; nor directly or indirectly threaten you with reprisals for engaging in union activities; nor create the impression that your union activities are under surveillance; nor suggest that you form a shop union as opposed to affiliating with an outside union.

WE WILL NOT discourage membership in, or activities on behalf of, Local 369, International Molders' and Allied Workers of North America, AFL-CIO, by discriminating against you in regard to your jobs.

WE WILL OFFER Mildred Boyce immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, with full seniority and all other rights and privileges, since she was found to have been discharged for supporting the Union's organizational campaign.

WE WILL make up all pay Mildred Boyce lost, plus interest.

WE WILL remove and expunge from our records the warning notice issued to Mildred Boyce by us on October 26, 1971.

WE WILL notify Mildred Boyce if presently serving in the Armed Forces of the United States of her right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

IMPACT DIE CASTING CORPORATION
Employer

Dated ..... By .....
(Representative) (Title)

Motion

[Caption Omitted]

MOTION TO REOPEN RECORD FOR RECEIPT OF NEWLY DISCOVERED EVIDENCE

NOW COMES IMPACT DIE CASTING CORPORATION, Respondent in the above captioned proceeding, by its attorneys, Witwer, Moran & Burlage, and respectfully moves that the Board enter an Order pursuant to Section 102.48(b) of the Board's Rules of Procedure, permitting Respondent's presentation of the newly discovered evidence described hereinbelow prior to issuance of its decision in this proceeding as follows:

1. By reopening this proceeding and ordering a supplemental hearing for the limited purpose of receiving testimony on the new matter herein described; or

2. By receiving such affidavits, answers to interrogatories or other written proofs as it may prescribe for purposes of ascertaining the truth with respect to such new matter.

In support of its motion aforesaid, Respondent alleges as follows:

1. That in defense of the charge that it terminated Mildred Boyce because of her union activities, Respondent has maintained that its action was based in part upon Boyce's filing of a fraudulent and duplicative insurance claim for medical benefits with Respondent's group insurance carrier containing information which she knew to be false, namely, the assertion therein that there was no other group insurance in her family applicable to said claim.

2. That at the hearing before the Trial Examiner and in its brief, Respondent has maintained that Boyce was

fully aware that her husband held group insurance at the time she filed her said claim while Boyce and the General Counsel have denied such fact.

3. That in his Decision dated May 16, 1972, the Trial Examiner credited and relied upon Boyce's version of the circumstances surrounding her said insurance claim.

4. That since the close of the hearing in this proceeding on January 26, 1972, Respondent has discovered that within the year immediately preceding her filing of the claim here at issue numerous claims covering the members of the Boyce family were filed and processed under her husband's said group insurance, and Boyce was personally the subject and beneficiary of at least one of said claims under her husband's group insurance, the same insurance of which she denied having any knowledge in the claim here at issue and in her testimony at the hearing.

5. That the new evidence sought to be introduced hereunder is a highly relevant and material element in Respondent's defense, not only for purposes of disclosing the true circumstances of said insurance claim but also to shed light on Boyce's creditability as a witness.

6. That the relief requested by Respondent herein will not materially delay issuance of a decision in this case, nor will it unduly inconvenience the parties hereto; that any inconvenience which might result is clearly outweighed by the right and duty of the Board to have before it all competent evidence which is available for purposes of making the record more factually accurate.

WHEREFORE, Respondent respectfully requests an order permitting introduction of the evidence described

herein, through such method or procedure as the Board shall deem fair and equitable.

Respectfully submitted,

WITWER, MORAN & BURLAGE

By /s/ Samuel W. Witwer, Jr.
Attorneys for Respondent,
Impact Die Casting Corporation

Witwer, Moran & Burlage
Attorneys for Respondent
141 West Jackson Boulevard
Chicago, Illinois 60604
(312) 427-8750

Suggestions in Support of Motion

[Caption Omitted]

SUGGESTIONS SUPPLEMENTING AND CLARIFYING RESPONDENT'S MOTION TO REOPEN RECORD FOR RECEIPT OF NEWLY DISCOVERED EVIDENCE

NOW COMES Respondent, Impact Die Casting Corporation, by its attorneys, Witwer, Moran & Burlage, and in support and clarification of its Motion of June 20, 1972 to Reopen the Record to receive newly discovered evidence states as follows:

1. Respondent's evidence is "newly discovered" under any reasonable definition of those terms. On Friday, June 16, 1972 Respondent was informed that numerous claims from the Boyce family were processed under the husband's insurance (Zurich) during the year immediately preceding the claim at issue in this proceeding; that Boyce was personally the subject and beneficiary of at least one of these claims; and that she signed documents and paperwork in connection therewith.

2. Such disclosures refute Boyce's claim that she knew nothing of the husband's insurance and require a different result in this proceeding than that contained in the Trial Examiner's Decision of May 16, 1971.

3. The evidence sought to be adduced is not merely peripheral but goes to the heart of this proceeding and should not be denied on the basis of technicalities or asserted procedural requirements. Moreover, the fact that the state of affairs upon which such new evidence is based may have antedated the hearing does not negative the fact that such evidence is "newly discovered".

Suggestions in Support of Motion

4. Any suggestion that it was negligent or remiss on the part of Respondent not to uncover such evidence prior to the hearing presupposes that Respondent should have prophesied Boyce's untrue denial of *any* knowledge concerning such insurance and that Respondent should somehow have unearthed such information from Zurich's confidential files covering an individual not even a party to this proceeding (Robert Boyce). While the law may require reasonable diligence of a party seeking reopening of the record, it does not require clairvoyance.

5. Even if it be assumed that Respondent lacked diligence in not probing into Zurich's internal files, the evidence in question should nevertheless be received under Board Rule 102.48(d) which provides in pertinent part:

> "Only newly discovered evidence, evidence which has become available only since the close of the hearing, *or evidence which the Board believes should have been taken at the hearing* will be taken at any further hearing." (Emphasis added)

It is clear from the above rule that "newly discovered" evidence is only one of three distinct types of evidence justifying reopening of the record. It is equally clear that the evidence proffered herein falls within one or more of the tests enumerated in said rule.

6. At the very minimum, Respondent should be permitted to submit and authenticate written exhibits bearing Boyce's signature showing her recent participation in claims made under her husband's insurance.

7. Respondent finds puzzling General Counsel's strenuous efforts to avoid introduction of the evidence proffered herein on the basis of theories of due diligence. If General

Counsel finds more importance in such theories than he does in the ascertainment of the truth in this proceeding, then such preoccupation with technicalities rather than substance is misplaced and should be rejected by the Board.

Respectfully submitted,

WITWER, MORAN & BURLAGE

By /s/ Samuel W. Witwer, Jr.
Attorneys for Respondent

National Labor Relations Board
Mildred Boyce and International
Molders' and Allied Workers of
North America, AFL-CIO v.
Impact Die Casting Corporation, Respondent
No. 38-CA-1309 [1-2];

DECISION AND ORDER
199 NLRB No. 32

On May 16, 1972, Administrative Law Judge[1] Samuel M. Singer issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, a motion to reopen record for receipt of newly discovered evidence, and a supplement thereto clarifying its motion, and the General Counsel filed a brief in support of the attached Decision and an opposition to Respondent's motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor

[1] The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and the motion to reopen the record[2] and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

---

[2] In its motion Respondent contends that it has recently discovered evidence which, if it were allowed to present would prove previous knowledge by the discriminatee of the duplicate insurance coverage which gave rise to Respondent's defense that she was discharged for falsification of an insurance claim. We deny the motion. The Administrative Law Judge has already found that Boyce had "untruthfully indicated on the claim form that no other group insurance applied to her family," but for the reasons fully explicated in his decision, with which we agree, he nevertheless found this asserted reason for the discharge to be pretextual. Additional evidence of the kind sought to be introduced would add nothing except further support for his finding of the untruthfulness of Boyce's representation.

Furthermore, the record reveals that at the hearing Respondent was put on notice of the existence of the evidence it now seeks to introduce when, during Respondent's cross-examination of Boyce's husband's insurance carrier's representative, he testified that other claims had been filed in the preceding year for the family by the husband. Respondent, however, either neglected or chose not to pursue examination on this subject, and it apparently has done so only since the hearing. In these circumstances, we do not consider the evidence Respondent now proffers to be "newly discovered."

[3] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Impact Die Casting Corporation, Sandwich, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. Sept. 25, 1972.

.....

Edward B. Miller, Chairman

.....

John H. Fanning, Member

.....

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Decision and Order

Order of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

(Argued April 12, 1973)

April 17, 1973

Before

Hon. JOHN S. HASTINGS, Senior Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Senior District Judge*

IMPACT DIE CASTING CORPORATION *Petitioner,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Petition to Review and Set Aside a Decision and Order of the National Labor Relations Board.
No. 72-1842	

This case arises upon the petition of Impact Die Casting Corporation (the Company) invoking the jurisdiction of this court under 29 U.S.C.A. § 160(f) to review and set aside an order of the National Labor Relations Board issued on September 25, 1972, and reported at 199 N.L.R.B. No. 32. The Board filed a cross-application for enforcement of the order pursuant to 29 U.S.C.A. § 160(e). The order found that the Company had violated §§ 8(a)(1) and (3)

* Judge Campbell of the Northern District of Illinois is sitting by designation.

of the National Labor Relations Act, as amended, 29 U.S.C.A. § 151 *et seq.*, by discharging employee Mildred Boyce for her union activity and by engaging in illegal communications with Boyce and other employees regarding their organizational efforts for a union. The order further directed the Company to cease and desist from its violations, to reinstate Boyce with full back pay and to post the usual compliance notice.

The Company alleges that the Board's findings were not supported by substantial evidence on the record as a whole. We disagree, and, for the reasons set forth in the Board's order, cited above, it is ordered that the Company's petition for review be denied and that the Board's order be enforced in full.

REVIEW DENIED.
ENFORCEMENT GRANTED.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1644

IMPACT DIE CASTING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion. The Board's decision and order (Pet. App. A1-A39, A45-A47) are reported at 199 NLRB No. 32.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1973. The petition for a writ of certiorari was filed on June 7, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION INVOLVED

Whether substantial evidence supports the Board's finding that the company discharged an employee because of her union activities.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 3.

STATEMENT

1. The Board found that the Company violated Section 8(a)(1) of the Act by coercively questioning employees concerning their union sympathies and attendance at meetings, creating the impression that their union activities were under surveillance, threatening employees with reprisals for engaging in union activities, soliciting employees' withdrawals from the Union, suggesting that they form a shop union instead of affiliating with an established union, and directing employees not to wear union buttons. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discharging Mildred Boyce because of her union activities. (Pet. App. A29, A33).

The evidence relating to the discharge of Boyce—the sole issue discussed in the petition[1]—is detailed below.

In August 1968, the Company—which casts aluminum and zinc dies—hired Boyce as a trim press operator, at a wage of $1.60 an hour. A few months later she was transferred to the booster cup machine and raised to $1.80 an hour. When terminated on November 8, 1971, she was a mill and lathe operator, earning $2.30 an hour. (Pet. App. A2, A15-A16; A. 85-86.)[2]

---

[1] Petitioner has indicated (Pet. 12) that it would also contest the Section 8(a)(1) findings should the petition be granted.

[2] "A." refers to the appendix to the briefs in the court below. "Tr." refers to the transcript of the proceedings before the trial examiner and "G.C.Exh." to the exhibits introduced by the General Counsel in that proceeding.

On August 24, 1971, Boyce telephoned John Grady, a representative of the International Molders and Allied Workers of North America, AFL-CIO, to ask him what employees "had to do to have * * * or join a [u]nion" (Pet. App. A3; A. 59, 87-88). The next day she telephoned him to report that a group of the Company's employees was ready to meet with him on August 28 (Pet. App. A3; A. 59, 88). After the meeting, Boyce campaigned for the Union, distributing the cards and literature which Grady had given her, and inviting employees to her home to sign authorization cards (Pet. App. A3; A. 88-91).

On August 31, Plant Superintendent Caquelin came to Boyce's work area, showed her an unsigned authorization card, and asked her if she "knew anything about it, and [if she was] involved with this union stuff." Boyce answered "no." (Pet. App. A3; A. 91.) Later that day Company President Becker asked Boyce if she was still interested in a die casting job. When she said "no," he asked if she was "involved" in union activity and Boyce again denied that she was (Pet. App. A3-A4; A. 91-92). The "next day or so" Caquelin requested Boyce to come to his office where he told her that he knew she was holding some authorization cards and that she was engaging in union activity (Pet. App. A4; A. 92-93). Caquelin asked Boyce to "hold the cards" and not turn them over to the Union. Boyce replied that she could not do so without the permission of those who had signed the cards. After work Boyce reported Caquelin's request to card signers, none of whom wanted their cards withheld. (Pet. App. A4; A. 93.) A "couple of days later," Becker also told Boyce that he "wanted to have the cards held, in fact, to throw them in the pot and burn them,

to get the union off his back". Later in the day, Caquelin told Boyce that he knew the identities of the employees who had attended the first meeting with the Union and that he knew where the meeting had been held. Caquelin offered to "draw up a contract and keep the people from harassment or termination if they would keep their cards from being [turned in] to the International." (Pet. App. A4-A5; A. 94, 96-97.)

At the end of August, in a management meeting, President Becker characterized Boyce as a "troublemaker and union organizer" and stated that the Company would have "to get rid of" her (Pet. App. A17; A. 124-125). Plant Superintendent Caquelin agreed with Becker (Pet. App. A17; A. 125). A couple of weeks later Caquelin commented to General Foreman Gibson, as he saw Boyce passing by, "You got to get rid of that fat ass. She is a troublemaker and an organizer, a union organizer" (Pet. App. A17; A. 125). Caqelin instructed Gibson to watch certain union activists, including Boyce, during breaks and lunch periods to "keep them from getting together and signing union cards and organizing" (Pet. App. A17; A. 125-126).

The Union's petition for an election was filed on November 4 (Pet. App. A10). About 2:30 p.m. on November 8, Boyce was called to Caquelin's office (Pet. App. A18; A. 101). There, in the presence of Vice President Hebel, Caquelin told Boyce that she was being discharged for falsifying an insurance claim (Pet. App. A18; A. 80-81, 101-102). Boyce had filed a claim for medical expenses incurred in connection with an injury to her three-year old son (Pet. App. A20; A. 103-105). When Boyce asked Caquelin what he meant by falsifying a claim, Hebel told her that "there was a question [on the claim form] as to whether or not any other application

or claim had been made, and she had stated no" (Pet. App. A18; A. 80, 102). In fact, eight days after Mrs. Boyce filed her claim, her husband, who was enrolled in another group insurance program through his employer, had also filed an insurance claim seeking reimbursement for the child's medical expenses (Pet. App. A20; A. 32; G.C. Exhs. 2, 7, 17(k); Tr.210-211). When Boyce asked, "Do I get some sort of paper to show I was terminated," Caquelin said she would not and told her to get her personal belongings and to leave at once (Pet. App. A18; A. 101, 80).

2. The Trial Examiner, whom the Board upheld, concluded that the Company "would not have terminated Mrs. Boyce * * * but for the fact that she was the prime mover, if not the very embodiment, of the Union drive which [the Company] admittedly opposed with all the vigor at its command" (Pet. App. A28). The Examiner concluded that "the discharge was, in substantial and controlling part, motivated by union animus, in violation of Section 8(a)(3) and (1) of the Act" (Pet. App. A33). He recommended, *inter alia,* that she be reinstated with backpay (Pet. App. A36).

The court of appeals sustained all of the Board's unfair labor practice findings, including those with respect to Mrs. Boyce, and enforced its order in full (Pet. App. A48-A49).

ARGUMENT

The issue stated in the petition (Pet. 2)—whether a discharge of a union adherent "which is primarily and effectively motivated by legitimate business considerations" violates the Act where "the employer was motivated 'at least in part' by anti-union animus"—is not presented on this record. The Board, adopting the

Trial Examiner's findings, found that "Boyce's union role was * * * [the] significant and controlling determinant in [the Company's] decision to discharge her" (Pet. App. A30), and that the alleged legitimate business considerations "were pretexts to cloak the true ground for the discharge" (Pet. App. 33).[3]

The petition, therefore, presents only the issue whether substantial evidence exists to support the Board's findings. Such an issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491. In any event, as shown in the Statement (pp. 2-5), the Board's findings are amply supported by the record.

---

[3] Petitioner's reliance on the Trial Examiner's statement that "In any event, it is clear that Boyce 'was discharged at least in part because of Union activity'" (citation omitted) (Pet. App. A28) is misplaced. That statement must be read in the light of his ultimate conclusions that the asserted grounds for discharge were pretextual and that Boyce would not have been discharged "but for the fact that she was the prime mover * * * of the Union drive * * *" (Pet. App. A28).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

JULY 1973.

[0031-1973-07]

FILE COPY

NO. 72-1644

FILED

MAY 16 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

IMPACT DIE CASTING CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

THOMAS D. BURLAGE
SAMUEL W. WITWER, JR.
Attorneys for Petitioner

Of Counsel:

WITWER, MORAN & BURLAGE
141 West Jackson Boulevard
Chicago, Illinois 60604

TWENTIETH CENTURY PRESS, CHICAGO 60605

No. 72-1644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

IMPACT DIE CASTING CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

This Reply Brief is filed by Petitioner, Impact Die Casting Corporation, in response to the Brief in Opposition filed with this Court by Honorable Robert H. Bork, Solicitor General of the United States, on behalf of the National Labor Relations Board (hereinafter called "Board").

ON THE RECORD AS A WHOLE, IT REMAINS CLEAR THAT THE BOARD EMPLOYED A "PARTIAL MOTIVATION" STANDARD IN FINDING THAT BOYCE'S DISCHARGE VIOLATED THE ACT.

In the brief filed on behalf of the Board, it is argued, in substance, that the legality of the "partial motivation" standard cannot be assailed in the instant case because such standard was not in fact relied upon by the Administrative Law Judge in reaching his decision. In so arguing, the

Board seemingly would have this Court disregard the Law Judge's finding that "In any event, it is clear that Boyce 'was discharged at least in part because of union activity . . . '" (A-28) Seeking the minimize the effect of the foregoing language, the Board observes:

> ". . . That statement must be read in light of his [the Administrative Law Judge's] other conclusions that the asserted grounds for discharge were pretextual and that Boyce would not have been discharged 'but for the fact that she was a prime mover . . . of the union drive . . . '" (See Brief in Opposition, pg. 6, footnote 3).

We submit that a correct reading of the Law Judge's decision leads to precisely the opposite conclusion from that advanced by the Board, namely, that the partial motivation finding constitutes the operative and definitive statement of the Law Judge's conclusions with respect to the circumstances of Boyce's discharge. All other findings and dicta concerning Petitioner's motives must by necessity be read in light of the penultimate statement that "*In any event* it is clear that Boyce 'was discharged *at least in part* because of union activity . . .'" (emphasis added).

Moreover, any suggestion that the partial motivation language is mere surplusage ignores the fact that such terminology has been deliberately used by the Board as its *ratio decidendi* in numerous discrimination cases. See, for example, *Pacific Plywood Company,* 134 NLRB No. 77 (1961), *American Compressed Steel Corp.,* 152 NLRB No. 39 (1965), and *Tom Wood Pontiac, Inc.,* 179 NLRB No. 98 (1969) enf'd. sub nom. *NLRB* v. *Tom Wood Pontiac, Inc.,* 447 F.2d 383 (7th Cir., 1971).

For the reasons stated, this Court should not permit the Board to side-step the central issue of law raised in the Petition for Writ of Certiorari by the simple expedient of disavowing a material and controlling portion of its own decision herein.

A RECENT DECISION OF THE SEVENTH CIRCUIT CONFIRMS THE FACT THAT SAID CIRCUIT ADHERES TO A "PARTIAL MOTIVATION" STANDARD.

In our Petition for Writ of Certiorari, we maintained that the Seventh Circuit Court of Appeals, by approving the Board's use of a partial motivation standard, thereby sanctioned an erroneous application of Section 8(a)(3) of the Act. Recent events demonstrate conclusively the correctness of Petitioner's assessment of the Seventh Circuit's position in discrimination cases.

On June 8, 1973, one day after the filing of the Petition for Writ of Certiorari herein, the Seventh Circuit entered its order in the case of *P. G. Berland Paint City* v. *NLRB*, (1973, reviewing 199 NLRB No. 145) No. 72-1943, __ F.2d __, a discharge case similar on its facts to the instant case.[1] Addressing itself specifically to the question of employer motivation, the Court said:

> "The Company does not deny that there was evidence of union animus on its part directed against this employee. Rather, the Company maintains that Van Ryswyk was not discharged, but voluntarily quit his job. There is no dispute that the employee absented himself from his job for a period of three working days. The parties disagree over whether the absenteeism was authorized by the Company. Assuming *arguendo* that Van Ryswyk absenteeism was unauthorized and therefore would have justified his dismissal, there is still substantial evidence from which the Board might reasonably conclude that the discharge was motivated *at least in part* because of the employee's concerted activity. Such circumstances, *at least in this Circuit*, constitute a violation of the Act, See *NLRB* vs.

---

[1] Petitioner respectfully calls to the Court's attention the *Berland* Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, No. 73-60, filed shortly after the instant petition, which raises issues of law identical to those raised herein.

Tom Wood Pontiac, Inc., 447 F.2d 383, 386 (7th Cir. 1971); *Borck Motor Sales, Inc.* vs. *NLRB*, 425 F.2d 677, 680 (7th Cir. 1970), cert. denied, 400 U.S. 823 (1970); *contrast NLRB* v. *Fibers International Corp.*, 439 F.2d 1311 (1st Cir. 1971)" (emphasis added)[2]

It should be noted that in the foregoing excerpt of its decision in *Berland*, the Court not only reaffirms its adherence to the partial motivation standard but also acknowledges the conflict which exists on this issue between its decisions and those of the First Circuit.

We contend that the need for this Court to resolve this conflict is clear. Failure to do so can only foster continued unfair and improper resort to subjective "partial motivation" findings in cases where abundant evidence of independent lawful grounds for discharge exists, as in the case at bar.

CONCLUSION

For reasons stated herein and in the Petition for Writ of Certiorari, the Writ should be granted.

Respectfully submitted,

THOMAS D. BURLAGE
SAMUEL W. WITWER, JR.
Attorneys for Petitioner

Of Counsel:

WITWER, MORAN & BURLAGE
141 West Jackson Boulevard
Chicago, Illinois 60604

---

[2] The text of the complete decision of the Seventh Circuit Court of Appeals in *Berland* is reproduced in the Appendix annexed to this brief at page A-1, supra.

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Argued May 24, 1973

June 8, 1973

Before

Hon. Tom C. Clark, Associate Justice*
Hon. Luther M. Swygert, Chief Judge
Hon. William J. Campbell, Senior District Judge**

G. BERLAND PAINT CITY, ., Petitioner		Petition for review of an order of the National Labor Relations Board.
72-1943	vs.	
TIONAL LABOR LATIONS BOARD, Respondent		

ORDER

. G. Berland Paint City, Inc. has petitioned to review set aside an order of the Board finding that the Comy has discriminated against employee Gerhardt Van wyk in violation of §§ 8 (a) (3) and (1) of the National or Relations Act (29 U S C §§ 158 (a) (1) and (3)). Board also concluded that the Company violated (a) (1) of the Act by threats of retaliation in order id itself of the union. The Board has filed a cross apation for enforcement of its order. The question thus whether there is substantial evidence in the record to port the order of the Board.

---

ssociate Justice Tom C. Clark of the United States reme Court, Retired, is sitting by designation.
Senior District Judge William J. Campbell of the Nor- n District of Illinois is sitting by designation.

This case is atypical in the sense that there is direct evidence to support the findings of the Board. When employee Van Ryswyk was discharged, he was told by one of the Company's owners that he had caused him "too much trouble with the Union and the Labor Board." Upon seeking reemployment at a later date, the employee was further informed that he could not be rehired until the Company got rid of the Union. We conclude that these incidents provide ample support for the Board's conclusion that the Company discharged employee Van Ryswyk and refused to reinstate him in retaliation for his Union activity. Van Ryswyk had previously participated in a strike against the Company and had also filed a grievance against the Company sometime prior to these incidents.

The Company does not deny that there was evidence of union animus on its part directed against this employee. Rather, the Company maintains that Van Ryswyk was not discharged, but voluntarily quit his job. There is no dispute that the employee absented himself from his job for a period of three working days. The parties disagree over whether the absenteeism was authorized by the Company. Assuming *arguendo* that Van Ryswyk absenteeism was unauthorized and therefore would have justified his dismissal, there is still substantial evidence from which the Board migh reasonably conclude that the discharge was motivated at least in part because of the employee's concerted activity. Such circumstances, at least in this Circuit, constitute a violation of the Act. See *N L R B vs. Tom Wood Pontiac, Inc.*, 447 F.2d 383, 386 (7th Cir. 1971); *Borek Motor Sales, Inc.* vs. *N L R B*, 425 F.2d 677, 680 (7th Cir. 1970); *cert denied*, 400 US 823 (1970); contrast *N L R B v. Fibers International Corp.*, 439 F. 2d 1311 (1st Cir., 1971).

There is also substantial evidence to support the Board's conclusion that the Company violated § 8 (a) (1) of the Act by threats of retaliation in order to eliminate the Union at its place of business. Again, the record contains several instances of statements by one of the Company owners indicating that he intended to "get rid of" the

on. In this regard, the Company characterizes the mony against it as "inherently improbable." Inasmuch redibility assessments are within the province of the inistrative Law Judge, we conclude that the Board's ing of an independent § 8 (a) (1) violation is sup- ed by substantial evidence in the record as a whole.

he order of the Board will be enforced.